Supreme Court, U.S.
FILED
DEC 10 1993
OFFICE OF THE CLERK

No. 93-788

In The

Supreme Court of the United States

October Term 1993

Donald E. Farrar, et al.,
Petitioners,

vs.

Franchise Tax Board,
Respondent.

On Petition For Writ of *Certiorari*
to the California Court of Appeal, First District

Brief *Amicus Curiae* on behalf of
Howard Jarvis Taxpayers Association and
Association of California Car Clubs
in support of Petitioner

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Having received the written consent of all parties to file this brief, Howard Jarvis Taxpayers Association and Association of California Car Clubs respectfully submit this brief *amicus curiae* in support of the petitioner for writ of *certiorari*, pursuant to Rule 37 of this Court. Consents have been filed with the Clerk. Neither association has a parent or reportable subsidiary under Rule 29.1.

INTERESTS OF AMICI CURIAE

Howard Jarvis Taxpayers Association is a non-profit public interest organization comprised of 240,000 members, some of which are believed to be members of the aggrieved class herein. The issue herein is also central to other cases in which the association is fighting unreasonable procedural barriers to challenging unconstitutional taxes. The Jarvis Association grew out of the passage of California's Proposition 13; its namesake, Howard Jarvis, was a father of the Jarvis-Gann Tax Limitation Initiative popularly know as "Proposition 13." The Jarvis Association and its co-*amicus* are uniquely qualified to alert the Court to the

danger which the opinion below poses to federal sovereignty far beyond the facts of this case.

California Association of Car Clubs is an organization promoting the preservation of historic vehicles; some of the Car Club's members are believed to be members of the class herein and others are targets of California's illegal tax discrimination against out-of-state collector vehicles. The Car Club is *amicus curiae* in the case upon which the California Court of Appeal principally relied in this case, *Woosley v. California*.[1] *Woosley* is on remand to the trial court. If *Woosley* is left unchanged, it will deprive many of Car Club's members of refunds of discriminatory license taxes on a theory very similar to the theory which the court below utilized in this case. All three levels of California courts unanimously found that the vehicle license fee at issue in *Woosley* discriminates against interstate commerce, but California's Department of Motor Vehicles continues to demand the discriminatory taxes (under threat of criminal sanctions) from a significant portion of the Car Club's members more than a year after the California Supreme Court's affirmation of the ruling that the discrimination violates the Commerce Clause.[2]

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[1] *Woosley v. State of California*, 3 Cal. 4th 758, 838 P. 2d 758, 13 Cal. Rptr. 2d 30 (1992) ("*Woosley*"). In *Woosley* the California Supreme Court *sua sponte* overturned a unanimous line of California cases endorsing class notices-of-claims for refund of taxes and held they were forbidden except where, and to the extent, specifically authorized by California tax statutes. The court remanded *Woosley* on two minor issues, but despite the remand Mr. Woosley petitioned this Court for a writ of *certiorari*. The State of California objected, *inter alia*, that the petition was premature (No. 92-1605, Brief of Respondents State of California et al., in Opposition to Petition for Writ of *Certiorari*, pp. 6-7, n. 3) and this Court denied *certiorari* (113 S.Ct. 2416 (1993)).

[2] The Legislature amended the vehicle license fee statute to eliminate the discrimination for vehicles purchased by their current owners after

REASONS FOR GRANTING REVIEW

I. THE OPINION BELOW PROVIDES A ROAD MAP FOR ANY STATE TO IGNORE THE FEDERAL CONSTITUTION ANY TIME IT PLEASES, AND THE OPINION CREATES A CONFLICT

As demonstrated *infra*, unduly burdensome state procedural barriers to the refund of taxes imposed on an activity encouraged by federal law influence human actions and market forces just as effectively as direct state prohibitions. Here, California utilized this truism to discourage investment in federal securities and thereby transgressed on the balanced federalism and respective spheres of sovereignty envisioned by the Constitution. The California Franchise Board ("Board") taxed interest on federal securities and after a court determination that such taxes were illegal, blocked any practical redress of the damage it caused to the market place for said securities. At the Board's request the California Legislature enacted a requirement that notices-of-claim for refunds on behalf of classes must be accompanied by the written consent of each class member at the time the notice is filed (the "Written Consent" requirement). This procedural legislation was applied retroactively to taxes previously collected illegally which are the subject of the instant action. Further bolstering the implementation of the State's *ex post facto* procedural barriers, years after initiation of this action California courts started to treat strict satisfaction of claim statutes as non-waivable jurisdictional requirements (*Woosley*, *supra*, 3 Cal. 4th at 789, 792), overruling a long line of controlling precedent, contrary to *stare decisis*. In California the Written Consent requirement "divides and conquers" people following fed-

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July 31, 1990; however, the Department of Motor Vehicles continues to discriminate in respect of vehicles purchased before that date.

eral encouragement by effectively denying them any practical weapon in their fight to protect their federal rights.

Effectively, California's message to those wishing to respond favorably to federal incentives to purchase federal obligations is:

> "The federal government may promise you that their bonds will be free from California taxes; however, we will make it so prohibitively expensive to exercise this right (by erecting limitless procedural barriers to a refund of such taxes) that you will wish that you had ignored the federal encouragement. And, for good measure, we do not have to tell you what the barriers will be in advance."

Such a threat is highly effective molder of conduct against federal objectives when the individual has a viable choice and relatively little money at stake, such as in instant case. Undoubtedly some people avoided investing in federal obligations because of the California tax risk. This reduced the market demand for the obligations. Under the facts of this case an investor could have (1) invested hassle-free in tax-free California obligations or (2) invested in federal obligations and borne the burden of satisfying all of the unknown roadblocks which the State might erect in the investor's way to evade making the refund -- the refund which is necessary to achieve the federal tax-free market place objective. Obviously, given these alternatives the rational investor will forgo investing in federal obligations. To contend that this burden against federal obligations does not have a forbidden negative influence on market decisions is analogous to arguing that a cloud on real property's title does not affect its marketability.

In this case the purchase of federal obligations is the federally-encouraged activity, but (if not barred by this Court) California's needless obstacles to refund will provide the pretext to effectively discourage all federally-protected activities, both activities specifically encouraged by

the United States and activities against which states are forbidden to discriminate, i. e. against interstate commerce.[3] One of the reasons why this Court reached its pre-emption holding in *Perez v. Campbell*, 402 U. S. 637 (1971) was because of the potential harm from giving a road map for states to avoid federal will.

> "[S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy -- other than frustration of the federal objective -- that would be tangentially furthered by the proposed state law." *Id.* at 652.

The California Court's opinion recognizes no restriction on California's erection of procedural barriers. In one short paragraph (Petition's App. at A-10 - 11) the court simply said that the taxpayer class had not cleared the barrier and that *McKesson Corp. v. Florida Alcohol & Tobacco Division*, 496 U. S. 18 (1990) ("*McKesson*"), allows barriers. The court refused to consider possible pre-emption of the procedural barrier. (App. at A-10.) In essence, it adopted the Board's insupportable attitude that the Board need not make a refund required by federal law unless the California Legislature says so. However, the right to a refund arises from federal law and cannot be unreasonably restricted by states. Extending the court's logic to other federally protected areas vividly demonstrates the infirmity of its decision.

If one were to assume, for example, that a State were imposing a tax clearly targeting a particular religion, undoubtedly this Court would hold that the State could not erect burdensome procedural barriers to excuse retaining the illegal tax. Strict scrutiny Equal Protection precedent

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[3]For ease of reading we do not always repeat the observation that what is said about federal encouragement also applies to federal prohibitions against state discrimination.

would become a mirage if States were able to prohibit through the tax procedure or "jurisdictional" back door what the state unquestionably cannot accomplish through the prohibition front door. The procedural back door is unnecessary procedural barriers to the return of unconstitutional taxes on the protected activity. It would cripple federal objectives to allow them to be evaded so easily. The reasoning which this Court would undoubtedly use in striking down unnecessary procedural barriers to redress religiously discriminatory taxation is equally applicable here. Compare, *Garrett v. Bamford*, 538 F. 2d 63 (3rd Cir. 1976) (allowing a tax case to proceed in federal court despite the Tax Injunction Act because the state opposed class actions and the case involved an important federal constitutional right).

This Court has held that strict local rules of procedure cannot be used to impose unnecessary burdens on rights of recovery authorized by federal laws (*Brown v. Western R. of Alabama*, 338 U. S. 294, 298-299 (1949) and underscored the public policy considerations favoring class actions in *Phillips Petroleum Co. v. Shutts*, 472 U. S. 797 (1985). *Phillips* demonstrates this Court's concern for the plight of the individual with a "small claim," or a lack of familiarity with the law. *Id.* at 809. Here it is against these expressed policies of federal law to allow the State needlessly to burden individual taxpayers; it is not practical to fight California's mass production taxation of federal rights with the Written Consents millstone around taxpayers' necks. Against this oppressive procedural barrier, the individual taxpayer with a modest claim is poorly armed to fight a constitutional battle against systemic, mass scale illegal taxation.

This court has a long history of pre-empting rules of procedure which interfere with federal policies. *American Ry. Exp. Co. v. Levee*, 263 U. S. 19 (1923) (local burden-

of-proof rule pre-empted by federally-sanctioned limitation-of-liability); *Davis v. Wechsler*, 263 U. S. 22, 24-25 (1923) (state rule re waiver of defenses pre-empted); *Brown v. Western R. of Alabama*, 338 U. S. 294, 299 (1949) (over-exacting local pleading requirements could not cause dismissal of federally created rights); *Dice v. Akron, C. & Y. R. Co.*, 342 U. S. 359, 361-363 (1951) (in a jury trial on a federal right, judge could not decide whether liability release was obtained by fraud); *Monessen Southwest R. Co. v. Morgan*, 486 U. S. 330, 335-336 (1988) (availability of prejudgment interest on federal law claim determined by federal law rather than local procedure).

Even closer to the controlling issue of instant case, many of this Court's decisions have struck down or waived administrative review barriers to the enforcement of important federal rights. In addition to cases cited in Petition, see *Mathews v. Diaz*, 426 U. S. 67, 75-77 (1976) (government waived requirement that plaintiff wait for an administrative decision); *Gibson v. Berryhill*, 411 U. S. 564, 574 (1973) (excused failure of corporate optician to litigate propriety of corporate practice of optometry before a board comprised of non-corporate opticians); *McNeese v. Board of Education*, 373 U. S. 668, 674-675 (1963) (administrative exhaustion not required in school segregation dispute).

Of special interest here is *Montana Bank v. Yellowstone County*, 276 U. S. 499, 505 (1927) (exhaustion deemed re state tax where agency had no power to correct). Here, the Board is also powerless to correct the federal violation because it cannot rule that a state statute violates the U. S. Constitution. Cal. Constitution art. III, § 3.5. Thus, under the Board's theory an important federal objective can be defeated by requiring Written Consents for a class notice-of-claim to a body which has no power to grant relief. The notice-of-claim was an exercise in futility, but Mr. Farrar

tried. The only purpose of the Written Consent requirement is to dissuade claims for refund.

Most of this Court's recent dissenting opinions in cases finding pre-emption have also recognized the principle that states cannot be allowed in the name of procedure to defeat important substantive rights granted by Congress, but simply disagree on where to draw the line. See, *Felder v. Casey*, 487 U. S. 131, 157 (1988) (O'CONNOR, J. dissenting) ("*Felder*"); *Southland Corp. v. Keating*, 465 U. S. 1, 31 (1984) (O'CONNOR, J. dissenting).

> "It is settled that a state court must honor federally created rights and that it may not unreasonably undermine them by invoking contrary local procedure. The assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. *Brown v. Western R. of Alabama*, 338 U. S. 294, 299 (1949)." *Id.* (Internal quotes omitted.)

Now is the time for this Court to spotlight the limits on the lengths to which the states may go before the states dig themselves into an even deeper hole by relying more and more on unconstitutional taxes in their budgeting process, relying on the opinion below as a King's X to protect them from having to pay the money back. The states, as well as the country as a whole, will be much more healthy if the states rely on legitimate sources of revenue. Otherwise, some day states will be taught a very expensive lesson when they misjudge the practical ability of a burdensome procedural barrier to protect them from their folly. It would be much less painful for the lesson to be learned early before the amounts of money involved become a major problem.

California's Written Consent requirement also conflicts with the enforcement of federal policy in other states. The Written Consent barrier stands in stark contrast with the situation in several states in which tax authorities are encouraged to follow federal policy and do not impose unconstitutional taxes because taxpayers can easily use class

notices-of-claims to uphold federal policy. In Arizona and Colorado, for instance, in practice as well as theory, the tax authorities are forced to exempt interest on federal obligations because aggrieved classes can use class procedures to force the refund of taxes when the tax authorities do not comport to federal law. *Andrew S. Arena, Inc. v. Superior Court*, 163 Ariz. 423, 788 P. 2d 1174, 1176 (Ariz. 1990); *Kuhn v. Colorado, Department of Revenue*, 817 P. 2d 101, (Colo. 1991). Such lack of conformity in enforcement of federal rights is contrary to the teachings of *Brown*, *supra*, 338 U. S at 295.

A conflict is also created because other states properly recognize that no notice-of-claim is required where the sole issue is constitutionality. *State, Dept. of Taxation v. Scotsman Mfg.*, 849 P. 2d 317, 319 (Nev. 1993). This Court should resolve these conflicts.

II. CALIFORNIA'S BARRIERS AGAINST GROUP ENFORCEMENT OF FEDERAL POLICY ARE PRE-EMPTED BECAUSE THEY DEFEAT AN IMPORTANT FEDERAL OBJECTIVE AND SERVE NO VALID STATE OBJECTIVE

A. The Validity Of State Procedural Barriers Should Be Determined By Weighing Legitimate Benefits To The State Against The Detriment To Federal Policy

In assessing a state law's impact on the federal objective, this Court looks as at the law's effects and refuses to rely solely on the legislature's stated purpose. *Glade v. National Solid Wastes Management Assn*, __ U. S. __, 112 S. Ct. 2374, 2387, 120 L. Ed. 2d 73 (1992), citing *Perez v. Campbell*, 402 U. S. 637, 651-652 (1971). Where the purpose or predominant effect of a state procedural device is to deny meaningful redress of important federal rights

(and Congress has not spoken on the device[4]) *Amici* submit that the Supremacy Clause requires a heightened scrutiny analysis. Since few rules have been laid down in this area, we suggest requiring the State to justify the barrier in a manner analogous to the justification required for discrimination against suspect classes and interstate commerce. As detailed below, the Board has not even begun to make such a showing and the court below refused to do any weighing.

This Court compares (1) the burden on a federal policy, and the significance of the policy, to (2) the valid policy behind the state procedural device. See Note, State Enforcement of Federally Created Rights, 73 Harvard L. Rev. 1551, 1560-1561 (1960). We ask the Court to consider the following criteria which appear appropriate for determining whether state practices unconstitutionally impinge on federal sovereignty: the importance of the federal objective, the burden on the party seeking to protect federal rights, the ability of the procedure to affect encouraged behavior, whether the procedure facilitates the determination of the dispute, whether the procedure is discriminatory against federal interests, the clarity of the procedure at the time the federally encouraged activity took place, and good faith.

A heightened scrutiny analysis of these factors exposes the Board's Written Consent requirement as an unconstitutional interference with federal policy, requiring it to be pre-empted. Any legitimate Board objectives could be achieved by much less burdensome measures than Written Consents.

As fully detailed in the Petition at 9-11 and in section I above, the Written Consent requirement places an unnecessary and insurmountable barrier in the way of the party

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[4]Of course, if Congress has specified, or prohibited a procedure, no weighting is allowed on the point.

standing up for an important federal policy here and tends to discourage the primary behavior encouraged by federal policy. In the latter respect, this case is more favorable for pre-emption than *Brown v. Western Ry., supra*, 338 U. S. 294, because it affects federally encouraged behavior -- investing in federal bonds. In contrast, it is unlikely that Georgia's pleading rules affected the care which the railroad showed for working conditions.

The Written Consent requirement was never meant to serve any substantial purpose to aid in the determination of a dispute, but rather merely as a trap for the unwary and as an insurmountable legal obstacle to all but the most persistent and wealthy. Board's calling the barrier an administrative remedy does not make it so. There is no record of a California administrative body ever approving a class notice-of-claim for refund of taxes, much less how the Written Consent requirement aided or smoothed the process. Examples of procedural rules which generally serve compelling dispute-determination purposes are: filing deadlines, page limitations for briefs, presumptions placing the burden of going forward, etc. Most importantly, these procedural devices are facially neutral and apply equally to all parties. Their purpose is to make the dispute resolution process run more smoothly (not to avoid it). Here, in contrast, the dispute resolution is not advanced one iota by the State's procedural requirement; rather, the requirement serves only to arbitrarily strengthen the State's goal of retaining its ill-gotten gains and thwarts the fair resolution of federal issues on their merits.

The Written Consent requirement was not apparent or foreshadowed, much less "strictly or regularly followed" at the time the unconstitutional *taxes were paid*. A state procedural rule has to be strictly and regularly followed to have any weight in adjudicating federal issues (*Hathorn v. Lovorn*, 457 U. S. 255, 263 (1982)) and timely *(McKesson,*

supra, 496 U. S. at 24, n. 4). Board's arguments to the contrary, there was no strictly enforced prohibition of class claims at the time the taxes were paid. As detailed in the Petition at 21, an unbroken line of cases endorsed class claims for refund until October 1992 when the California Supreme Court *sua sponte* reversed the line in *Woosley, supra*, 3 Cal. 4th 758, thereby foisting upon innocent class members, who had misplaced their trust in *stare decisis*, a deprivation of rights and property because the statute of limitation had run.

The Written Consent requirement is discriminatory against federal rights. The requirement is not neutral, first, because the Board has no power to rule the California statute unconstitutional. Cal. Constitution, art. III, § 3.5. See *California Comm'n v. United States*, 355 U. S. 534, 539 (1958) (Administrative procedures pre-empted because statute was clearly aimed at the United States and Commission was unqualified to decide constitutional issues).

Second, the requirement is not neutral because it "... extends only to governmental defendants and thus conditions the right to bring suit against the very ... entities Congress intended ..." (*Felder, supra*, 487 U. S. at 144) to forbid from taxing interest on federal obligations. "[T]he notice-of-claim provision most emphatically does discriminate in a manner detrimental to the federal right: only those persons who wish to sue governmental defendants are required to provide notice ..." (*Id.* at 146.)

> "[T]he notice-of-claim provision is imposed only upon a specific class of plaintiffs -- those who sue governmental defendants -- and, as we have seen, is firmly rooted in policies very much related to, and to a large extent directly contrary to, the substantive cause of action provided those plaintiffs. This defendant-specific focus of the notice requirement serves to distinguish it, rather starkly, from rules uniformly applicable to all suits, such

> as rules uniformly applicable to all suits, such as rules governing service of process or substitution of parties...." *Id* at 145.

Finally, there is discrimination against enforcing the prohibition against taxation of federal interest because (1) class notices-of-claims are allowed for non-tax disputes with California government entities (*City of San Jose v. Superior Court*, 12 Cal. 3d 447, 454-458, 525 P. 2d 701, 115 Cal. Rptr. 797 (1974)) and (2) the administrative body is required to give notice of format deficiencies in non-tax notices-of-claims to avoid waiver (California Govt. Code § 911).

The facts here are even stronger for pre-emption than in *Felder* and answer the reservations of the *Felder* dissent. First, unlike in *Felder*, the Board is forbidden by the California Constitution to give the relief necessary -- the ability to declare a statute unconstitutional. Cal. Constitution, art. III, § 3.5. Second, the barrier in *Felder* apparently was in place when the federal right arose, but it was not imposed here until after the right arose. Third, it would have been relatively easy for Mr. Felder to have filed suit in federal court to avoid the state barrier, and it would have been very difficult here. 28 U. S. C. § 1341. Fourth, Mr. Felder filed no notice-of-claim, but Mr. Farrar did. Finally, compliance in *Felder* would not have been expensive (*Felder*. at 149) but it would be here. This case is much closer to *Brown v. Western R. of Alabama*, 338 U. S. 294, 298-299 (1949) than to *Felder*, and the *Felder* dissent took pains to distinguish *Felder* from *Brown*. 487 U. S. at 159-160 (O'CONNOR, J., dissenting).

California cannot credibly claim that it exercised good faith. In 1983 the trial court in *Brown v. Franchise Tax Board*, 197 Cal. App. 3d 300, 242 Cal. Rptr. 810 (1987) relied on cases applying settled precedent in finding the tax illegal, yet the Legislature did not repeal, and the Board continued to collect, the tax for many years. There is no

evidence that the Board timely attempted to persuade the Legislature to correct the flawed legislation. Instead it sought to build a procedural moat around the illegal tax. Unfortunately, California has not manifested any good faith desire to comport to Constitutional dictates, and it is this Court's duty to force California to remedy its wrong.

B. The Result, And The Only Credible Purpose, Of California's Written Consent Requirement Is To Discourage Federal Objectives

The purpose of California's restrictions on class notices-of-claims was, and is, to make it essentially impossible for victims of indiscriminate collection of federally-prohibited taxes to redress California's evasion of the federal policy. California's statutory requirements were specifically enacted in response to the predecessor of this action, *Brown v. Franchise Tax Board* (*supra*, 197 Cal. App. 3d 300) (holding illegal the very taxation at issue here and certifying a class)) to make *impossible* the class action approach that was so successful in that action. (Petition's App. at A-17 - 18.)

The principal valid purpose of claim statutes -- to give the agency notice -- is better served by encouraging class claims for refund than by discouraging them. The valid purpose of notice-of-claim statutes is to give public entities an opportunity to investigate, correct and settle the problem promptly without the cost of litigation. *Tucker v. Alexander*, 275 U. S. 228, 231 (1927); *Felder, supra*, 487 U. S. at 157 (O'CONNOR, J. dissenting). Individual claims are less likely to alert the Board to the scope of a systemic problem than a class claim. The Board has to decipher and piece together individual claims to estimate the eventual scope of the problem and resulting exposure. On the other hand, a class notice gives an overall description of the problem, highlighting the common issues of fact an law and describing the group of people harmed. See section C

below. It is also more likely to grab the agency's attention than an individual claim, and provide a precise legal basis for the Board to consider.

C. The Board's Rationalizations For The Written Consent Requirement Are Illogical And Do Not Withstand Heightened Scrutiny

A proper pre-emption analysis of any alleged justification for a state procedural barrier must assume that everyone affected will vault the procedural hurdle. Discouraging the refund of illegally collected taxes is an invalid objective. The Board's rationalizations rest on the advantages to the Board of taxpayers failing to clear the barrier. In contrast, Statutes of limitations are justified by the benefits to the system from *compliance* with the rule -- actions being filed within a reasonable period of time -- not by the benefit to the opponent when a litigant *fails to comply* with the statute.

None of the Board's arguments for requiring the Written Consents at the time of notice-of-claim filing is credible. The pretexts given were to avoid the

> "administrative effort and expense ... in order to [1] identify the class members, [2] notify and [3] correspond with the class members, [4] evaluate their claims, and [5] ultimately issue refunds." (Petition's App. at A-17 - A-18, numbering added.)

None of these purposes is a credible reason for placing a crippling burden on the class representative at the time the notice-of-claim is filed. California has a well thought out, efficient body of law on class actions which the Board and the Written Consent requirement ignore. See generally 4 Witkin, California Procedure, Pleading (3rd Ed. 1985), §§ 193, *et seq.* San Francisco Superior Court Class Action Rules 427.1-.7 ("Rules" of the trial court in this action) provide a useful framework for analyzing the validity of the

Board's reasons. An excerpt from the Rules is reproduced in our Appendix at pages 1a-7a.

We now address the Board's ostensible reasons:

1. Requiring Written Consents from the class members when the notice-of-claim is filed does nothing to reduce the Board's cost of determining each class member's name at the time the name is needed. Rule 427.1(g) recognizes that it is most efficient to identify the class members late in the process. (However, an examination of the difficulty of identifying individual class members is an important early sub-issue under Rule 427.3, and existence of the class member's names on computerized records (such as here) is a big plus.) The Board has given no justification for determining the names prior to decision on the central issue, i.e. the Board's procedure puts the cart before the horse. Moreover, once names are required, the costs of identification could be paid out of the common fund, according to the equities of the case, because allocation of identification costs is within the sound discretion of the court. See Rule 427.6, Appendix at 6a. Furthermore, the Legislature could require that the costs be paid out of the common fund despite the equities, a much less intrusive burden on federal objectives than the Written Consent.

2. Requiring Written Consents from the class members does not reduce the Board's cost of giving notice to class members. Rule 427.6 recommends that consideration of notice be delayed until after all other class certification issues are decided. It recognizes that notice is not always be required and that notice by publication may be more appropriate than notice by mail. (Rule 427.6, our Appendix at 6a, (b)(ii).) Even though the normal (and justifiable) result is that when the Board loses it pays the cost of notice, the Legislature could have taken the much less intrusive step of requiring that notice be paid out of the common fund rather than effectively prohibiting class claims.

3. Requiring Written Consents of class members at the notice-of-claim stage tends to increase rather than decrease the Board's cost of corresponding with class members. The very fact that they have been contacted to obtain their consent logically will cause them to ask more questions of the Board than if they had not been prematurely contacted.

4. Written Consent to a class notice-of-claim does nothing to simplify the evaluation burden other than by the illegal expedient of discouraging meritorious claims. Evaluation consists of two parts: (1) evaluation of common issue of law and fact (Rule 427.2), and (2) evaluation of each individual's facts. On the common issues law and facts, class claims are more efficient for the Board to evaluate than individual claims because they are more likely to be prepared by experts and are more likely to avoid specious or legally untenable arguments than individual claims. In this case, the principle individual fact to be evaluated is how much federal interest was taxed to each individual. In some cases the Board will have all of the information it needs in its computerized records and a proof of claim to obtain individual amounts would be wasteful. Payors of interest (such as the mutual funds) are required to report to the tax authorities in computer readable form the amount of interest paid to each person with the person's social security number. 26 U. S. C. § 6049. Thus, evaluation of the amount for each person is possible without additional information from the class member. If information were required from class members to determine each member's individual amount, class members could fill out questionnaires customized for the case rather than having to speculate years in advance as to what information the Board needs. The important point in analyzing the Board's evaluation argument is that any constitutional analysis of this argument must assume that every person aggrieved by the Board's action gives consent, but the Board's argument re-

lies on the fact that few class representatives have the resources to secure consents. In short, the State is imposing antiquated methods of gathering information pertaining to tax refund claims for the disingenuous purpose of making assertion of taxpayers' rights needlessly burdensome. The disingenuousness of the State's methodology is thoroughly exposed by its ingenuousness in information gathering when it is collecting taxes; i.e. it demands and receives information on computer disks. It could and should use the same information to make refunds here.

5. Contrary to the Board's argument, the cost of issuing refund checks is a normal cost of a government which would not be reduced by Written Consents. If the Board approved 40,000 separate claims, it would have to prepare its internal paperwork for and issue 40,000 checks. If the Board's denial of 40,000 claims were overturned in court it would still have to issue and mail 40,000 checks. Requiring 40,000 Written Consents prior to filing a class claim does nothing to change this fact.

The Board's real complaint was that it had to justify costs outside of its normal budget for sending out 40,000 checks in *Brown*; however, this Court's reversing here would help that problem, too. Once this Court gives the Legislature the message that burdensome procedural barriers will not protect states from having to return taxes collected in violation of federal policy, the Legislature can no longer so easily ignore the probability of the Board having to make refunds of illegally collected taxes in establishing budgets. The Legislature will also be more likely to avoid passing obviously illegal taxes in the future. In contrast, taxpayer *compliance* with the Written Consent requirement does nothing to alleviate the Board's budget problem, only *failure to comply* alleviates the problem.

6. Finally, consent of the taxpayer is implicit (or it could be explicitly obtained) by the class member's endorsement of the refund check.

D. The California Court Of Appeal Read A Few Sentences Of *McKesson* Out Of Context As A Pretext To Evade Federal Policy

Many courts are undermining federal policy by taking a few words out of context from the opinion in *McKesson Corp. v. Florida Alcohol & Tobacco Division*, 496 U. S. 18 (1990) ("*McKesson*") as an unlimited justification for procedural barriers.

Both the context and the wording of *McKesson's* discussion of procedural devices demonstrate that this Court's endorsement of procedural devices was limited to those giving tax authorities a fair opportunity to estimate their legal exposure for financial planning, not to give them an unfair advantage in keeping unconstitutional taxes. The Florida Supreme Court ruled that, due to Florida's need for fiscal planning, the surprise occasioned by the court's finding of a Commerce Clause violation justified Florida's failure to redress the constitutional wrongs. *Id.* at 44. This Court overruled, and answered the Florida court's "surprise" argument by observing that states can protect their interest in "stable fiscal planning" with various procedural devices. *Id.* at 45. The emphasis of this Court in *McKesson* was on the financial *stability*, not the financial *condition*, of Florida. "Stability" focuses on predictability for planning, avoiding unforcastable ups and downs, giving governments time to plan and develop alternate sources of funds. States need a fair opportunity to manage their affairs in an orderly fashion, but nothing in *McKesson* approves what California has done here -- impose unjustified *ex post facto* procedural barriers for the purpose of enriching the State. Taxpayers should not be able to sandbag states with refund exposures and legal theories out of the blue, but states should not be

able to sandbag taxpayers with non-waivable procedural requirements, and that is what the Board did here.

Furthermore, *McKesson* is explicit in holding that the procedural devices must be in place when the taxes are paid (*Id.* at 24, n. 4) but the requirement of Written Consents was not passed until 1986, after the payments at issue.

While some examples of procedural devises were mentioned in *McKesson*, no specific device was before the Court and there was no discussion of pre-emption of procedural barriers which unduly interfere with federal policies. The court below took this Court's concern for avoiding surprise as a *carte blanche* for states to erect unlimited retroactive procedural barriers to evade altogether the financial consequences of their violations of federal policies. This interpretation is at fundamental odds with the bedrock holding of *McKesson* that States cannot use their own financial *condition* as an excuse for not eliminating discrimination against interstate commerce. *Id.* at 50.

CONCLUSION

We urge this Court to grant *certiorari* because the states know that united, the taxpayers can stand up to the states' illegal actions, but divided the taxpayers fall victim to action-influencing unconstitutional taxation. In this and many other cases the tax is contrary to the national policy and will discourage conduct encouraged by federal policy.

Respectfully submitted,

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Appendix

Excerpt from San Francisco Local Rules of Court

Class Actions

427. ISSUES: DOCUMENTS FOR PRESENTATION

Set out in Section 427.1-.7 are the issues which must be resolved by order after one or more hearings. Also set out with each issue are subjects which should be included in the documents submitted in support of each party's position on said issue. These subjects are not exclusive but do represent the minimum information which the court deems necessary for presentation by the parties on each issue.

.1. *Issue: Constitution of the class.* The party alleging existence of a class will submit one or more declarations which present facts describing in detail the composition of the class, including the following: (The facts submitted in a declaration must stand the test to which oral testimony would be subjected in the trial of an action. The declaration should contain enough competent evidence to convince the trier of fact. Averments which are satisfactory in pleadings are not competent evidence. The declaration should show the source of the declarant's information, that is, the declaration should contain a proper foundation.)

(a) The approximate number of persons in the class. If there are subclasses, the declaration also should describe each and set out the approximate number of persons in each subclass.

(b) The general geographical location (or locations) of the class members. If the class is not confined to California, the description will include those locations outside California where the class members are located.

(c) A description of the status of the class members where relevant to the action (e.g., minors, particular ethnic, occupational, economic, professional or other group).

(d) A description of the members of each subclass between whom issues of law or fact must be litigated.

(e) A description of those class members, including an estimate of their number, whose claims must be approved or evidence presented only as to each individual member.

(f) Other facts which describe the class. These other facts should describe the class with sufficient thoroughness that it therefore can be accurately and particularly described.

Further, the class representative will submit a statement presenting his position concerning:

(g) The manner in which and the time when the individual class members will be identified. If individual identification is not contemplated, the reasons therefor (e.g., reliance on fluid class recovery or nonmonetary relief. See *Blue Chip Stamps v. Superior Court* (1976) 18 Cal. 3d 381.)

(h) Other matters relevant to this issue:

If the declarations demonstrate that the class is interstate, the party maintaining the action will submit, in addition to other memoranda, a memorandum on the subject of whether this court has jurisdiction to render a binding judgment in favor of, or against, nonresident, unserved class members.

.2. *Issue: Common, Similar and Unique Questions of Law and Fact.* Each party will submit a statement discussing each of the following:

(a) Those issues of law which are common to all class members.

(b) Those issues of law which are similar to all class members and, with respect to each such issue, a detailed

statement concerning how said issues may be determined on other than an individual basis.

(c) Those issues of law which are unique to one or more class members, but which must be presented in the trial. In the description of these unique issues of law, the segments of the class to which they are applicable will be described with a statement of the number within the class to whom each unique issue applies.

(d) The issues of law which must be litigated between class members.

(e) Those issues of fact which are common to all class members.

(f) Those issues of fact which are similar to all class members, with a detailed statement concerning how each such issue can be determined other than on an individual basis.

(g) Those issues of fact which are unique to one or more class members but which must be presented in the trial. In the description of these unique issues of fact, the segments of the class to which they are applicable will be described with a statement of the number within the class to whom each unique issue applies.

(h) The issues of fact which must be litigated between class members.

Each party also will discuss whether the issues of law and fact which are either common to all members of the class or, if not common, are similar and susceptible to proof by evidence applicable to all members of the class, predominate over issues which must be tried on an individual basis. These statements will set out an estimate of the number of witnesses and the time for their testimony upon issues which exist only as to individual or subclasses

(including issues which must be litigated between class members).

.3. *Issue: Superiority of the Class Action to Other Available Methods for the Fair and Efficient Adjudication of the Controversy.*

Each party will submit statements concerning:

(a) Procedures alternative to a class action which might adjudicate the issues involved in the action. These will include an estimate of the time of trial of each alternative proceeding.

(b) The effectiveness of the remedies available under the alternatives described compared to those available under the class action. This could include a discussion of the number of persons who may receive compensation after each alternative proceeding (whether directly or indirectly by virtue of the judgment) and the difference, if any, in the amount thereof.

(c) The ability of the court to manage the alternative proceedings in relation to its ability to manage the conduct of the class action.

(d) The benefit to the public from each alternative proceeding. (E.g., if the action challenges the constitutionality of a statute, is a class action therefor of any greater benefit to the public than one on behalf of named plaintiffs only?)

(e) The propriety of relief other than money damages. This should include a discussion of the alternatives of fluid recovery, injunctive relief without any type of money damages (except attorney's fees and costs), or a combination of several types of relief.

(f) A description of other actions purporting to be brought on behalf of the same class, raising the same or similar issues, and a statement of the reasons the instant action should be allowed to proceed parallel to the others or

should be abated or dismissed. (See section 427.7(a) for motions to coordinate cases pursuant to Code Civil Procedure, sec. 404 et seq.)

(g) If the action purports to be brought on behalf of a class which includes residents of states other than California, a statement as to whether (aside from jurisdictional limitations) the court should limit the class to California residents for reason of public policy and manageability.

* * *

.6. *Issue: Necessity for and Content Of Notice.*

It is recommended that this issue not be dealt with until the party advocating the existence of the class has received a favorable ruling from the court on the first five issues. At the time of the court's favorable ruling on the first five issues, the court will generally shorten the time for notice of this sixth issue.

When the moving party submits a motion concerning this issue, such motion must include:

(a) Original and copy of proposed order approving notice to the class;

(b) Original and copy of proposed notice to the class of pendency of class action.

Although as a general rule notice to the class of the pendency of the action shall be ordered, notice to the class is not necessary in all actions, and an order may be made, on motion of a party, dispensing with the requirement that the class be notified of the action. When a public entity or a public officer or public employee in his official capacity is an unnamed member of the plaintiff or defendant class, notice of the motion to dispense with the requirement that the class be notified of the action must be served on said public entity, public office or employee in the same manner as a civil summons is served.

When the moving party submits a motion for an order concerning the giving of or dispensing with notice, such party will submit a statement on each of the following (e.g., said party will submit the proposed orders set forth above, even though he seeks an order dispensing with notice):

(a) A document discussing whether notice should be given at all.

(b) A statement which assumes that notice will be given and discusses:

(i) The time when notice should be given.

(ii) The manner in which notice will be given. This will include a discussion concerning whether said notice should be published, mailed or otherwise brought to the attention of class members. If recommended to be published, it will include the recommended publication media, including an estimate of the cost thereof. If recommended to be mailed, it will include a statement of the manner in which addresses of the class members will be obtained and an estimate of the cost of preparation of the notice and of said mailing. If notice is to be given through other means, a description of said other means will be set out in detail, including an estimate of the cost. Each estimate of cost will contain a statement of the factual basis thereof. Each statement also will include an estimate, with the factual basis therefor, of the percentage of the class members which the party believes will receive knowledge of the pending action through use of each notice media.

(iii) The party which should bear the cost of giving the notice or manner in which the cost thereof should be divided between the parties.

(c) Each proposed notice will include, at least, a representation concerning each of the following:

(i) Brief explanation of the case, including basic contentions or denials of the parties.

(ii) Any member who so requests by a specified date may exclude himself from the class and the action by giving notice thereof ("opting out").

(iii) Information concerning how class members who desire to be excluded from the class ("opt out") may give notice thereof.

(iv) The claim of a member who does not request to be excluded from the class will be terminated by the judgment in the action under the rule of res judicata.

(v) Any member who does not request exclusion may move the court for permission to appear as a named class corepresentative.

(vi) The estimated total amount of the recovery, the anticipated fee which will be sought by counsel for the class, the anticipated other expenses and costs to the class which will be paid from the funds recovered before distribution of the net proceeds to class members, and the net amount to be recovered by each member if the action is successful (a formula statement will be satisfactory).

(footnotes omitted.)